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IN THE

Supreme Court of the United States

October Term, A. D. 1957

No. 764

Jo EISINGER and LORAIN B. EISINGER,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

Jo EISINGER and
LORAIN B. EISINGER,

Pro Se.

Of Counsel:

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COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Earl Warren, Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioners, Jo Eisinger and Lorain B. Eisinger respectfully petition this Honorable Court for a Writ of Certiorari to review a judgment and opinion of the Court of Appeals for the Ninth Circuit, rendered in this cause on December 10, 1957. Their petition respectfully shows:

Opinions Below.

(1) The report of the Opinion delivered by the Court of Appeals for the Ninth Circuit has not been published in the official reports as yet, but appears in 1 AFTR 2d 58-321 and 58-1 USTC par. 9132.

A copy of said Opinion is set forth as Appendix "A" hereto.

(2) The report of the Opinion delivered by the Tax Court of the United States [R. 41] does not appear in the official reports but may be found in C. C. H. Dec. 21,599(M); T. C. Memo. 1956 and 1956 P-H T. C. Memorandum Decisions, par. 56,048.

Jurisdiction.

Statement of the ground on which the jurisdiction of the Supreme Court is Invoked:

(1) The judgment of the Court of Appeals for the Ninth Circuit was entered on December 10, 1957, and is set forth as Appendix "B" hereto.

(2) Jurisdiction to review the judgment of the Court of Appeals for the Ninth Circuit by writ of certiorari is conferred on this court by Section 1254 of Title 28 of the United States Code.

Question Presented.

Whether under the provisions of the 1939 Internal Revenue Code, Sections 22(k) and 23(u), a husband in determining his net taxable income may deduct payments made by him to a former wife pursuant to a written agreement incorporated into a decree of divorce which

(1) designates the payments as being for the support of the wife,

(2) provides that in consideration of the payments being made, the wife agrees to support their minor children,

(3) nowhere makes definite or assigns precisely the amount or portion of the payments for the benefit of the children,

(4) nowhere restricts the use of any sum or portion to the support of the minor children, and

(5) nowhere expressly provides any sum as "payable for the support of the minor children."

Statutes and Regulations Involved.

(1) Internal Revenue Code of 1939:

Sec. 22. GROSS INCOME.

* * * * * * * *

(k) [As added by Sec. 120(a), Revenue Act of 1942, c. 619, 56 Stat. 798] *Alimony, Etc., Income.*— In the case of a wife who is divorced or legally separated from her husband under a decree of divorce or of separate maintenance, periodic payments (whether or not made at regular intervals) received subsequent to such decree in discharge of, or attributable to property transferred (in trust or otherwise) in discharge of, a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce or separation shall be includible in the gross income of such wife, and such amounts received as are attributable to property so transferred shall not be includible in the gross income of such husband. This subsection shall not apply to that part of any such periodic payments which the terms of the decree or written instrument fix, in terms of an amount of money or a portion of the payment, as a sum which is payable for the support of minor children of such husband. In case any such periodic payment is less than the amount specified in the decree or written instrument, for the purpose of applying the preceding sentence, such payments to the extent of such sum payable for such support, shall be considered a payment for such support. * * *

(2) Regulation 111, Section 29.22(1)-1.

Treasury Regulations 111, promulgated under the Internal Revenue Code of 1939:

Sec. 29.22(k)-1. *Alimony and Separate Maintenance Payments—Income to Former Wife.*—

(a) *In general.*—Section 22(k) provides rules for treatment in certain cases of payments in the nature of or in lieu of alimony or an allowance for support as between spouses who are divorced or legally separated under a court order or decree. For convenience, the payee spouse will hereafter in this section of the regulations be referred to as the "wife" and the spouse from whom she is divorced or legally separated as the "husband." See section 3797(a)(17).

* * * * * * * *

(d) *Payments for support of minor children.*—Section 22(k) does not apply to that part of any periodic payment which, by the terms of the decree or the written instrument under section 22(k), is specifically designated as a sum payable for the support of minor children of the husband. * * *

(3) 1939 Internal Revenue Code, Sec. 23(u):

Section 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * * * * *

(u) [As added by Sec. 120(b), Revenue Act of 1942, supra] *Alimony, Etc., Payments.*—In the case of a husband described in section 22(k), amounts includible under section 22(k) in the gross income of his wife, payment of which is made within the husband's taxable year. If the amount of any such payment is, under section 22(k) or section 171, stated to be not includible in such husband's gross

income, no deduction shall be allowed with respect to such payment under this subsection. (26 U. S. C. 1952 ed., Sec. 23.)

(4) Regulation 111, Sec. 29.23(u)-1. *Periodic Alimony Payments.*—A deduction is allowable under Section 23(u) with respect to periodic payments in the nature of, or in lieu of, alimony or an allowance for support actually paid by the taxpayer during his taxable year and required to be included in the income of the payee wife or former wife, as the case may be, under Section 22(k). As to the amounts required to be included in the income of the wife or former wife, as the case may be, see Section 29.22(k)-1. (For definition of husband and wife in such cases, see Section 3797(a)(17).)

* * * * * * * * *

Statement.

Basis for Jurisdiction.

(1) In the Tax Court of the United States:

Internal Revenue Code, Section 272 (1939 Code) provided in part as follows:

> "If in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed . . . the Commissioner is authorized to send notice of such deficiency to the taxpayer by registered mail. Within ninety days after such notice is mailed . . . the taxpayer may file a petition with the Tax Court of the United States for a redetermination of the deficiency." (Sec. 6212(a) and Sec. 6213(a) of the 1954 Code are substantially the same as Sec. 272 of the 1939 code.)

Petitioners' petition to the Tax Court of the United States provided in part:

> "2. The notice of deficiency (a copy of which is attached and marked Exhibit 'A') was mailed to the petitioners, care of their attorney, Aaron B. Rosenthal, 416 West Eighth Street, Suite 1009-16, Los Angeles 14, California, on January 29, 1953." [R. 5.]

The petition to the Tax Court for redetermination of the deficiency was filed by petitioners on April 17, 1953, that is, within ninety (90) days of mailing of the notice of deficiency [see Docket Entries, R. 3].

Therefore, the Tax Court had jurisdiction to determine the petition for redetermination filed by petitioners.

(2) In the United States Court of Appeals for the Ninth Circuit:

Internal Revenue Code, Section 7482 (1954 Code), provides in part as follows:

> "(a) *Jurisdiction.*—The United States Court of Appeals shall have exclusive jurisdiction to review the decisions of the Tax Court . . . in the same manner and to the same extent as decisions of the district courts in civil actions tried without a jury. . . ." (Sec. 1141(a) 1939 Code substantially unchanged.)

Internal Revenue Code, Section 7483 (1954 Code) provides in part:

> "The decision of the Tax Court may be reviewed by a United States Court of Appeals as provided in Section 7482 if a petition for such review is filed by . . . the taxpayer within 3 months after the decision is rendered." (Sec. 1142 in part, of the 1939 Code, unchanged.)

The returns for the calendar years 1949 and 1950, the years in question, were filed by petitioners with the then Collector of Internal Revenue for the Sixth District of California at Los Angeles, California [see "Petition," R. 5, and "Petition for Review," R. 53].

The United States Court of Appeals for the Ninth Circuit is the Circuit Court in which is located the Los Angeles, California, Office of the then Collector of Internal Revenue (28 U. S. C. A., Sec. 41).

The decision of the Tax Court in *Eisinger et ux. v. Commissioner,* Docket No. 47971 was rendered on June 13, 1956 [see "Decision," R. 52]. The Petition for Review was filed by petitioners in the United States Court of Appeals for the Ninth Circuit on September 10, 1956, which was within three months of rendition of the Tax Court Decision [see "Docket Entries," R. 4].

Therefore, the United States Court of Appeals for the Ninth Circuit had jurisdiction to hear and determine the appeal.

Facts.

In 1949, Wilhelmina Eisinger instituted suit for divorce from petitioner Jo Eisinger. At the time, Jo and Wilhelmina Eisinger were the parents of two minor children. The parties entered into a written property settlement agreement, which was subsequently modified and incorporated into a decree of divorce dated May 26, 1949. The relevant portions thereof are:

1. The husband agreed to pay the wife "by way of alimony" $125.00 per week [R. 28].

2. In consideration for the payment of alimony, the wife agreed to support the minor children [R. 28].

3. If the wife failed to support either or both of the children, the husband could, at his option, pay the cost of their support and deduct the amount he paid from the alimony of $125.00 per week provided for the wife. The instrument placed no limitation on the amount the husband could deduct [R. 28].

4. If the husband were called upon to pay any claim asserted against him by reason of a debt incurred by the wife for any purpose without limitation, he could at his option, stop making the payments of alimony of $125.00 per week until the weekly alimony aggregated the amount of the claim or claims. Again, the instrument placed no limitation on the amount the husband could deduct from each payment provided for [R. 30].

5. The parties expressly incorporated into the agreement their entire understanding. No oral statements nor prior written matter extrinsic to the agreement was to be in force or effect [R. 26].

6. Upon remarriage of the wife, the alimony payments of $125.00 per week were to cease. "In lieu thereof," however, the husband agreed to pay $31.25 per week for support and maintenance of each minor child [R. 28].

7. The payments of alimony of $125.00 per week were to be reduced $31.25 per week upon death or attainment of age 21 by either child [R. 29].

In addition, it should be noted that:

(a) At all times, the agreement refers to the payments to the wife as alimony [R. 19-30].

(b) Nowhere does the agreement provide for any specific sum or portion of the payments made to be applied by the wife for support of the children.

(c) Nowhere does the agreement specifically provide that the payments to be made to the wife were for "support of children" except, in the event of the wife's remarriage, in which case the husband agreed to pay "in lieu of" alimony payments $31.25 per week for support and maintenance of each child [R. 28].

(d) During the years 1949 and 1950, Wilhelmina Eisinger had not remarried, and both children were living and under twenty-one years of age.

Pursuant to the terms of the agreement and decree, Jo Eisinger made payments to Wilhelmina in the sums of $3,850.00 and $6,677.00 for the calendar years 1949 and 1950 respectively and petitioners (Jo Eisinger and his then wife, Lorain B. Eisinger) deducted the full amount of the payments made from gross income as alimony paid on their joint individual income tax returns filed for the subject years. The Commissioner disallowed the sums of $1,925 00 and $3,364.50 for 1949 and 1950 respectively on the ground that part of the payments made was "payable for the support of minor children" within the meaning of Section 22(k) and 23(u) of the 1939 Code.

Petitioners filed a petition for redetermination of the deficiency assessed by the Commissioner. The Tax Court held "that the amount for the support of the children is identifiable" and therefore not deductible.

In their appeal to the Court of Appeals for the Ninth Circuit, petitioners took the position that the agreement did not "fix . . . as a sum which is payable for the support of minor children" any part of the payments made because the agreement neither obligated the wife nor imposed upon her the duty to expend or apply any definite sum or portion of the payments made only for the support

or benefit of the children. The Court of Appeals rejected petitioners' contention and affirmed the Tax Court Decision.

Reasons Relied on for Allowance of the Writ.

The decision of the Court of Appeals for the Ninth Circuit as to the meaning of the words "fix . . . as a sum which is payable for the support of minor children" as used in Section 22(k) of the 1939 Internal Revenue Code is in conflict with the decisions of the Courts of Appeal for the Second and Sixth Circuits.

(1) Petitioners' appeal to the Court of Appeals for the Ninth Circuit sought a reversal of the Tax Court decision primarily upon the ground that the Tax Court had misconstrued the meaning of the words "fix . . . as a sum which is payable for the support of minor children." Petitioners relied on the case of *Weil v. Commissioner*, 240 F. 2d 584 (2nd Cir., 1957), and urged the Ninth Circuit to adopt the rule enunciated in the *Weil* case as to the meaning of the above quoted words. Petitioners contend that *Weil v. Commissioner, supra,* laid down the rule that:

> ". . . sums are payable 'for the support of minor children' when they are to be used for that purpose only. . . . [I]f sums are to be considered 'payable for the support of minor children,' their use must be restricted to that purpose. . . ." (240 F. 2d 588.)

Nowhere in the agreement between petitioner Jo Eisinger and his former wife was she obligated or required to apply any specific sum or portion of the payments only for the support of the minor children. Therefore the use of such sums was not restricted to "the support of minor

children." Since no part of the payments made by petitioner Jo Eisinger was "payable for the support of minor children," as defined by the *Weil* case, in affirming the Tax Court Decision, the Ninth Circuit in effect rejected the rule there laid down as to the meaning of the statutes in question.

Petitioners are aware that the terms of the agreement in *Weil v. Commissioner, supra,* differ from the terms of the agreement in the instant case. However, the dissimilarity in terms does not alter the conclusion that in neither case did the "decree or written instrument fix . . . a sum which is payable for the support of minor children . . ." under the rule adopted by the Second Circuit in the *Weil* case.

In *Hirschon v. Commissioner,* ..... F. 2d ..... (2nd Cir., 1957), the Second Circuit has reaffirmed the rule it laid down in the *Weil* case. There, on facts similar to *Weil v. Commissioner, supra,* it again reversed the Tax Court and, quoting from its decision in the *Weil* case stated:

> "'The statute taxes to the wife sums which are available for her own use and benefit—whether or not she has undertaken to support the minor children—and does not tax to the wife sums she is required to devote exclusively to the support of the children. What vitiates the decision of the Tax Court in this case is its holding that sums may be 'payable for the support of minor children,' even though the wife may be free to use them for other purposes.'" (..... F. 2d .....)

Eisinger's agreement required him to make certain payments "by way of alimony" to his former wife. She agreed in return to support their two minor children. By the terms of the agreement, all of the payments made to

the wife in the years 1949 and 1950 were available for her own use for any purpose and nowhere was she required to devote any sum "exclusively to the support of the children." It is therefore apparent that the decision of the Court of Appeals in the instant case cannot be reconciled with the rule adopted by the decisions in the Second Circuit.

In addition to being in conflict with the Second Circuit decisions, the Ninth Circuit opinion is also in direct conflict with the recent Sixth Circuit decision in *Deitsch v. Commissioner*, 249 F. 2d 534 (6th Cir., 1957). As in the *Weil, Hirschon* and *Eisinger* cases, in the *Deitsch* case the Tax Court held for the Commissioner. The terms of the *Deitsch* agreement were almost identical to those of the *Eisinger* agreement, in that as in the *Eisinger* case, payment to Deitsch's wife were to be reduced by fixed amounts on death, attainment of a stated age (18), or emancipation of either of the children. Moreover, if any of the above conditions were fulfilled as to each child, payments were to *cease entirely*. Nevertheless, the Sixth Circuit reversed the Tax Court and held that no part of the payments made were "fixed" as "payable for the support of minor children." The court reasoned:

> "The term 'fixed' is not ambiguous. It therefore must be construed in its usual sense of 'to assign precisely; * * * to make definite and settled.' Webster's New International Dictionary, 2nd Edition."
>
> "The provisions of the separation agreement do not 'assign precisely' nor 'make definite' the amount or portion of the periodic payments for the benefit either of the wife, or of the children. . . . The wife was not limited to any particular amount for her

> own maintenance and support and more may have been properly expended for that purpose in 1950 than for the children." (249 F. 2d 536.)

The provisions of the Eisinger agreement neither "assign precisely" nor "make definite" the amount or portion of the periodic payments for the benefit of either the wife or of the minor children. Nor by the terms of the instrument was the wife "limited to any particular amount for her own maintenance and support." Therefore, had the Sixth Circuit's reasoning been adopted, the instant case would have been decided in petitioners' favor. This is made clear by the Court of Appeals for the Ninth Circuit when, in its only reference to the case, it stated, "we disagree with *Deitsch v. Commissioner*. . . ." (..... F. 2d .....)

It is thus apparent that the decision of the Ninth Circuit in the instant case is in conflict with the decisions in two other Circuits, and for this reason petitioners urge this Court to consider the question presented and to rule on the correct meaning and application of the disputed sections of the Internal Revenue Code.

(2) Petitioners contend that the rule adopted in the Second and Sixth Circuits is the correct interpretation of the statutes in question because it gives effect to the clear language used by Congress. On the other hand the rule adopted by the Ninth Circuit (if it be a rule at all) is one which alters the apparent meaning of the words used by Congress.

Unfortunately, the legislative history of the statutes in question is not helpful. One is therefore compelled to determine the meaning intended from the words themselves and the context in which they were used. Section 22(k)

of the 1939 Internal Revenue Code provides that certain periodic payments shall be included in the gross income of a former wife except for ". . . that part of any such periodic payment which the terms of the decree or written instrument fix, in terms of an amount of money or a portion of the payment, as a sum which is payable for the support of minor children of such husband." Section 23(u) provides that the husband may deduct any payment made which the wife must include under Section 22(k).

It is to be noted particularly that for the wife to exclude part or all of the periodic payments she receives subsequent to the decree of divorce, there must be an amount of money or portion of the payment fixed "as a sum which is payable for the support of minor children of such husband," and, it must be fixed by "the terms of the decree or written instrument."

Congress could have used the words *earmarked* or *designated* or *apportioned* or *allocated* or *intended* "as a sum which is payable for the support of minor children," or any other word or words which would clearly support the result reached by the Ninth Circuit. In using the words it did, Congress must be taken to have had some purpose.

As the Sixth Circuit reasoned in the *Deitsch* case, the "term 'fixed' . . . must be construed in its usual sense of to assign precisely; * * * to make definite and settled." Therefore, to be "fixed" as payable for support of the children, the instrument must "assign precisely" or "make definite and settled" the amount "payable for the support of the minor children." And, sums are not "payable for the support of minor children" unless the

wife "is required to devote exclusively to the support of the children" some definite sum or part of the payment. (*Weil v. Commissioner*, 240 F. 2d 588.)

It is unreasonable to conclude that Congress intended that the Internal Revenue Service, or a reviewing court should be compelled to speculate on the subjective intent of the parties not clearly expressed in the agreement. Yet under the Ninth Circuit's interpretation of the statutes, that is the natural result as is clearly illustrated by the reasoning of the Court of Appeals in its opinion. (..... F. 2d .....; Appendix "A" p. 9.)

In addition to the fact that the meaning ascribed to Section 22(k) by the Second and Sixth Circuits is the one more likely intended by Congress, it is also preferable to the one adopted by the Ninth Circuit because it is easier to apply, and creates certainty and therefore less litigation rather than confusion. Under it, the only test the taxpayer, the Commissioner or a Court need apply in determining whether it is proper to deduct from gross income payments made to a former wife, is whether the decree or instrument expressly designates some sum as "payable for the support of minor children" or, whether under its terms some sum or portion of the payments made is expressly designated as being only for the benefit of the children.

In its decision, the Ninth Circuit stated:

> "The general rule which we here approve is that when the settlement agreement, read as a whole, discloses that the parties have earmarked or designated or apportioned or allocated the payments to be made, *one part to be payable for alimony, and another part to be payable for the support of children*, with sufficient certainty and specificity to readily determine which is which, without reference to contingencies

> which may never come into being, then the 'part of any periodic payment' has been fixed 'by the terms of the decree or written instrument' and satisfies the statutes and regulations hereinbefore quoted." (..... F. 2d .....; Appendix "A", pp. 9-10.)

It is submitted that under this so-called "general rule," each case is made to depend on a minute examination of the terms of the agreement in an effort to determine the subjective intent of the parties thereto. Moreover, the taxpayer, the Internal Revenue Service and the Court are without specific guide posts to assist them in deciding whether any part of the payments made may be deducted by the husband. *Query* when a "settlement agreement, read as a whole, discloses that the parties have earmarked or designated or apportioned or allocated the payments to be made, *one part to be payable for alimony, and another part to be payable for the support of children,* with sufficient certainty and specificity to readily determine which is which, without reference to contingencies which may never come into being?"

That the question here presented is important to a great many taxpayers is adequately illustrated by the great number of cases litigating the correct way to treat payments made to a former wife pursuant to a written instrument or decree of divorce. The Commissioner's brief in the Court of Appeals alone cited the following sixteen Tax Court cases involving this question.

> *Ball v. Commissioner,* decided April 13, 1955 (1955 P-H T. C. Memorandum Decisions, par. 55,-084);
>
> *Budd v. Commissioner,* 7 T. C. 413;
>
> *Chapin v. Commissioner,* decided July 28, 1957 (1947 P-H T. C. Memorandum Decisions, par. 47,224);

Fisher v. Commissioner, decided April 30, 1956 (1956 P-H T. C. Memorandum Decisions par. 56,098);

Fleming v. Commissioner, 14 T. C. 1308;

Gantz v. Commissioner, 23 T. C. 576;

Hicks v. Commissioner, decided June 19, 1953 (1953 P-H T. C. Memorandum Decisions par. 53,216);

Leslie v. Commissioner, 10 T. C. 807;

Mackay v. Commissioner, decided May 6, 1949 (1949 P-H T. C. Memorandum Decisions par. 49,105);

Moitoret v. Commissioner, 7 T. C. 640;

Morsman v. Commissioner, 27 T. C. 520;

Neuwahl v. Commissioner, decided February 19, 1951 (1951 P-H T. C. Memorandum Decisions par. 51,045);

Seltzer v. Commissioner, 22 T. C. 203;

Swallen v. Commissioner, decided May 22, 1951 (1951 P-H T. C. Memorandum Decisions par. 51,149).

Other Tax Court cases not cited by the Commissioner, involving this question are:

Joslyn v. Commissioner, 23 T. C. 126;

Weil v. Commissioner, 22 T. C. 612;

Deitsch v. Commissioner, 26 T. C. 751;

Hirschon v. Commissioner, 27 T. C. No. 62 (1957);

Eisinger v. Commissioner, decided June 13, 1956 (1956 P-H T. C. Memorandum Decisions par. 56,048).

In the following seven of the above twenty-one Tax Court cases, appeals were taken to the Courts of Appeals:

Budd v. Commissioner, 177 F. 2d 198 (6th Cir., 1947);

Deitsch v. Commissioner, 249 F. 2d 534 (6th Cir., 1957);

Eisinger v. Commissioner, ... F. 2d ..... (9th Cir., 1957);

Hirschon v. Commissioner, ... F. 2d ..... (2nd Cir., 1957);

Joslyn v. Commissioner, 230 F. 2d 871 (7th Cir., 1956);

Mandel v. Commissioner, 185 F. 2d 50 (7th Cir., 1950);

Weil v. Commissioner, 240 F. 2d 584 (2nd Cir., 1957), *cert. denied*, May 13, 1957.

Petitioners submit that unless a uniform rule is adopted by this Court, the great number of cases litigating the interpretation of separation agreements which provide payments for support of both the wife and minor children will continue, if not increase, both in those circuits where the Court of Appeals has not as yet been called upon to decide this question, and in those jurisdictions where, as in the Ninth Circuit, a rule is adopted which makes each case depend upon a determination of the subjective intent of the parties thereto from the wording of the agreement. The Court need only consider the increasingly great number of divorces granted annually in the United States wherein minor children are involved.

In addition, although it arises under the 1939 Internal Revenue Code, the question presented in this case is a continuing one, since the Sections here under consideration have been retained, substantially unchanged as Sections 71(a) and 71(b) of the 1954 Internal Revenue Code.

Conclusion.

For the foregoing reasons we respectfully submit that this petition for a writ of certiorari should be granted.

Dated: January 30, 1958.

Jo EISINGER and

LORAIN B. EISINGER,

Petitioners
Pro Se.

Of Counsel:

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APPENDIX "A."

Opinion for the United States Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the Ninth Circuit.

Jo Eisinger and Lorain B. Eisinger, Appellants, vs. Commissioner of Internal Revenue, Appellee. No. 15,387. Dec. 10, 1957.

On Petition for Review of the Decision of the Tax Court of the United States.

Before: Lemmon and Barnes, Circuit Judges; and Yankwich, District Judge.

BARNES, Circuit Judge:

This is a timely appeal or petition to review from a decision of the Tax Court. The original jurisdiction of the Tax Court (Int. Rev. Code of 1939, Section 272)[1] and of this court on review (Int. Rev. Code of 1939, Section 1141(a) and Section 1142)[2] is not in issue.

Jo and Lorain Eisinger, husband and wife, seek to deduct from their joint income tax return for the years 1949 and 1950 the total payments made by Jo Eisinger to his former wife, Wilhelmina Eisinger, in accordance with the terms of a certain property settlement agreement, dated March 28, 1949, and amended April 28, 1949, incorporated into the terms of a decree of divorce, obtained in Florida on May 26, 1949, dissolving the marriage of Jo and Wilhelmina Eisinger. At the time of the divorce there were two children, the issue of said marriage, both minors.

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[1]1954 Internal Revenue Code, Sec. 6212(a) and Sec. 6213(a).

[2]1954 Internal Revenue Code, Sec. 7482-3.

Taxpayers deducted the sums of $3,850 and $6,677, respectively, from their gross income for the two years. The Commissioner of Internal Revenue determined that of such sums, fifty per cent, or $1,975 and $3,364.50, respectively, represented payments for the support of the two minor children, and hence were not deductible.

Petitioners claimed the entire sums were periodic payments which Jo Eisinger was obligated to make pursuant to an agreement incident to a decree of divorce, as contemplated by Section 22(k) of the 1939 Internal Revenue Code, and hence properly deductible under Section 23 of said Code.

Internal Revenue Code, Section 22(k) reads in material part as follows:

> "(when) a wife . . . is divorced . . . from her husband under a decree of divorce . . . , periodic payments . . . received subsequent to such decree in discharge of . . . a legal obligation which, because of the marital or family relationship, is imposed upon or incurred by such husband under such decree or under a written instrument incident to such divorce . . . shall be includible in the gross income of such wife. . . . This subsection shall not apply to that part of any such periodic payment which the terms of the decree or written instrument fix, in terms of an amount of money or a portion of the payment, as a sum which is payable for the support of minor children of such husband."

Section 23 provides:

> "In computing net income there shall be allowed as deductions: . . . (u) . . . In the case of a husband described in Section 22(k), amounts includ-

ible under Section 22(k) in the gross income of his wife, payment of which is made within the husband's taxable year. . . ."

Under the Code, only where payments made by the husband to the wife qualify for inclusion in the wife's income under Section 22(k), may the husband deduct such payments under Section 23(u). Therefore, where payments made are "payable for the support of minor children," within the meaning of Section 22(k), they may not be deducted by the husband.[3]

The Property Settlement Agreement provides that the wife should have custody of the two minor children, and states:

"4. The Husband agrees to pay to the Wife, by way of alimony, the sum of One Hundred Twenty-five Dollars ($125.00) per week, commencing upon the date of the entry of the final decree of divorce in the action presently pending between the parties in the Circuit Court of the 11th Judicial Circuit of Florida . . . and weekly thereafter, and in consideration thereof the Wife agrees to support the aforesaid children. If the Wife shall fail to support either or both of said children, the Husband may pay the cost thereof and deduct the same from said weekly alimony. Said payments shall continue during the life of the Wife and shall cease upon her death or upon

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[3]Relevant portions of Regulations to the Code of 1939 are Regulations 111, Sec. 29, 22(k)-1, which repeats the Code Section and then adds:

"If, however, the periodic payments are received by the wife for the support and maintenance of herself and of minor children of the husband without such specific designation of the portion for the support of such children, then the whole of such amounts is includible in the income of the wife as provided in Section 22(k)."

the death of the Husband. Upon the remarriage of the Wife all alimony payments to her shall cease, but in lieu thereof the Husband shall pay the sum of Thirty-one and 25/100 Dollars ($31.25) per week for the support and maintenance of each child of said marriage until such child shall attain the age of twenty-one (21) years, at which time the aforesaid payments for such child shall cease and terminate. Whether or not the Wife shall remarry, as each child shall attain the age of twenty-one (21) years, the aforesaid alimony shall be reduced by Thirty-one and 25/100 Dollars ($31.25) per week for each child thus attaining the age of twenty-one (21) years. It is the intention of the parties that when both of said children shall have attained the age of twenty-one (21) years the Husband shall pay to the Wife alimony in the sum of Sixty-two and 50/100 Dollars ($62.50) per week during her life and until her remarriage; provided, however, that no alimony shall be paid to the said Wife if the Husband shall die or if the Wife shall have meanwhile remarried or shall have died. It is also agreed that the said payments of alimony to the Wife shall be reduced by the sum of Thirty-one and 25/100 Dollars ($31.25) per week in the event of the death of either of said children before he shall have attained the age of twenty-one (21) years, and if both of said children shall die before attaining said age the alimony for said Wife shall be reduced by the sum of Sixty-two and 50/100 ($62.50) per week.

6. (a) The Wife does and shall accept the provisions hereof in full satisfaction for her support and maintenance and for the support and maintenance of the minor children of the marriage. . . ."

Briefly stated, appellants maintain that by the agreement, "no specific designation of a sum payable for support of the minor children" was made; hence the whole sum paid can be deducted by him. The Commissioner maintained, and the Tax Court supported his decision, that construing the agreement in its entirety, "the amount for the support of the children is identifiable," and hence is sufficiently specifically designated so as to satisfy the statute and regulations which prohibit such sum identifiably designated as payable for support of children from being deductible by the husband.

Appellants rely largely on a recent decision by Judge Medina in the Second Circuit, *Weil v. Commissioner*, 240 F. 2d 584 (1957).

We agree with it, in its application of the law to the facts of that case, but do not find the legal position there taken applicable herein, nor do we agree with the generality of some of its language.

There the Tax Court held that under the terms of the property settlement agreement then before it, there was "fixed" certain sums payable for the support of minor children. Judge Medina, speaking for the Court, disagreed with such an interpretation. We shall first consider what the Second Circuit said about the law applicable and then consider the similarity and differences between the agreement there and here under consideration.

The Court said:

> "The key words of the statute are 'payable for.' The context of Section 22 demonstrates that the Congress used this phrase advisedly. The wife is not relieved of taxability on sums which she in fact expends for the support of minor children, but only on such sums as 'the terms of the * * * instrument

fix * * * as * * * payable for' that purpose. The statute taxes to the wife sums which are available for her own use or benefit—whether or not she has undertaken to support the minor children—and does not tax to the wife sums she is required to devote exclusively to the support of the children. What vitiates the decision of the Tax Court in this case is its holding that sums may be 'payable for the support of minor children,' even though the wife may be free to use them for other purposes.

Despite two decisions seemingly to the contrary, Henrietta S. Seltzer, 22 T. C. 203, and Dorothy Newcombe, 10 T. C. M. 152, affirmed on another point, 9 Cir., 203 F. 2d 128, the Tax Court has, in a series of cases culminating in the case at bar, adopted the position that it is enough if anywhere in the instrument there is mentioned a sum thought to be appropriate for the support of minor children under some circumstances.

* * *

We hold that sums are 'payable for the support of minor children' when they are to be used for that purpose only. Accordingly, if sums are to be considered 'payable for the support of minor children,' their use must be restricted to that purpose, and the wife must have no independent beneficial interest therein. This cannot be the case if the terms of the instrument contemplate a continuance of the payments to the wife after she has ceased to support the children. The fortuitous or incidental mention of a figure in a provision meant to be inoperative, unless some more or less probable future event occurs, will not suffice to shift the tax burden from the wife to the husband.

* * *

We agree with the statement of the Commissioner in his brief that in order to sustain the determination of the Tax Court it is necessary to find in the agreement 'sufficient provisions showing an intention on the part of Charles Weil to provide for his minor children specifically, as distinct from an intention to provide for his former wife and have her in turn provide for the children.' But we are conviced that the agreement contains no such provisions. It is quite true that the agreement must be read as a whole, Mandel v. Commissioner, 7 Cir., 185 F. 2d 50; Budd v. Commissioner, 6 Cir., 177 F. 2d 198, and that no particular formula, such as the phraseology we have quoted from Section 22(k), is necessary. This particular instrument, however, must be construed as expressing the husband's intention to make payments to the wife and have her support the children, the very converse of what the Commissioner states is necessary to support the orders of the Tax Court in these cases." 240 F. 2d 584, 587-588.

In describing the property settlement agreement in the *Weil* case, the court points out that from one periodic payment to be made to the wife, she was to support, maintain and educate the children and herself.

"Except in the remarriage clause the agreement nowhere requires the wife to devote any specified amount to the support of the children, nor unless she remarries, are the payments to her to be reduced if it becomes no longer necessary for her to support either or both of the children." 240 F. 2d 584, at 588.

To the contrary the contract there interpreted specifically provided that payments to the wife should not be

revised, even though one or both children died, or became of age, or because either failed to longer live with their mother.

It is true that if the wife *remarried*, then by the terms of the Weil agreement, during each child's life before majority while living with their mother, the father agreed to pay $200.00 per child to the mother. This was the only contingency mentioned by reason of which any specification of amounts for child support could be ascertained. The reliance on this contingency, which might never occur, caused the Second Circuit to refer to the Tax Court's "fine tooth combing" endeavors.

In contrast, we here have an agreement in which the Commissioner properly emphasized the following facts, none of which existed in the *Weil* case:

(a) If the wife did not remarry, the original $125.00 per week payments were to be reduced by $31.25 as each child reached majority.

(b) "It is the intention of the parties that when both of said children shall have attained the age of 21," the husband shall pay alimony of $62.50 per week.

(c) Payments were to be reduced by $31.25 per week upon the death of either child prior to his majority.

(d) "If the wife shall fail to support either or both of said children, the husband may pay the cost thereof and deduct the same from said weekly alimony."

(e) Upon remarriage of the wife, "all alimony payments to her shall lease, but in lieu thereof the husband shall pay $31.25 for the support and maintenance of each child . . . until such child shall attain the age of 21."

The husband, when he entered into this agreement, had a moral and legal duty to (a) pay his wife alimony, and (b) support his minor children. He recognized that duty, and entered into the property settlement agreement. By the language used, he arranged to pay his wife alimony, and have her support herself and the children. Can there be any doubt that in setting the various figures used therein—($125.00, $62.50 and $31.25)—each of the parties had in mind they were agreeing the wife would need and have $62.50 per week, and each child $31.25? We recognize that the Internal Revenue Laws uses the language "payable for," and does not concern itself with whether the children receive any precise amount of support, or any support. But these parties did concern themselves. The husband saw to it that if the wife failed to use "her" support money for the support of the children, the husband could pay to the children, or for them, and deduct such amounts from the wife's "alimony payments." Ths was a laudable agreement on the part of both for the benefit of their children. It establishes conclusively in our mind how the parties regarded the payments. Suppose, in full accordance with the terms of his property settlement agreement, the husband had deducted from his payments of alimony to his wife $62.50 per week, and expended that sum directly for the benefit of his children, over a period of years. Would anyone suggest his wife could recover the full $125.00 per week as her alimony, or that the husband would in any way be in contempt of the Florida court decree?

The general rule which we here approve is that when the settlement agreement, read as a whole, discloses that the parties have earmarked or designated or apportioned or allocated the payments to be made, *one part to be payable for alimony, and another part to be payable for the*

support of children, with sufficient certainty and specificity to readily determine which is which, without reference to contingencies which may never come into being, then the "part of any periodic payment" has been fixed "by the terms of the decree or written instrument" and satisfies the statutes and regulations hereinbefore quoted. *Joslyn v. C. I. R.,* 7 Cir., 230 F. 2d 871 (1956); *Mandel v. C. I. R.,* 7 Cir., 185 F. 2d 50 (1950); *Budd v. C. I. R.,* 6 Cir., 177 F. 2d 198 (1947), affirming per curiam, 7 T. C. 413 (1946); *Morsman v. Commissioner,* 27 T. C. 520 (1956); U. S. Treas. Reg. 111, Section 29.23(u)-1 (1939). We disagree with *Deitsch v. Commr.,* 6 Cir., 26 Law Week 2265; ..... F. 2d. .....

Under this general rule, the trier of fact does not rely on "[T]he fortuitous or incidental mention of a figure in a provision meant to be inoperative unless some more or less probable future event occurs, (which) will not suffice to shift the tax burden from the wife to the husband." (*Weil v. Commissioner, supra.*) Neither should a strained or unnatural construction be allowed to shift the tax burden from the husband to the former wife.

The decision of the Tax Cort is *Affirmed.*

(Endorsed:) Opinion. Filed Dec. 10, 1957.

Paul P. O'Brien, Clerk.

APPENDIX "B."

Judgment.

United States Court of Appeals for the Ninth Circuit.

Joe (*sic*) Eisinger and Lorain B. Eisinger, Petitioners, vs. Commissioner of Internal Revenue, Respondent. No. 15387.

Upon petition to review a Decision of the Tax Court of the United States.

This cause came on to be heard on the Transcript of the Record from the Tax Court of the United States, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the decision of the said Tax Court of the United States in this cause be, and hereby is affirmed.

(Endorsed:) Judgment. Filed and entered December 10, 1957. Paul P. O'Brien, Clerk.